Submitted 20-602 Relf
Dec 21 1874

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 721.

GEORGE TREAT AND J. M. DICKERSON, PLAINTIFFS IN ERROR,

vs.

SAMUEL JEMISON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED NOVEMBER 9, 1874.

Dec. 21, 1874

SUPREME COURT OF THE UNITED STATES.

No. 721.

GEORGE TREAT AND J. M. DICKERSON, PLAINTIFFS IN ERROR,

vs.

SAMUEL JEMISON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Answer	14	6
Bond	38	13
Bill of exceptions	25	9
Citation	a	1
Complaint	5	3
Clerk's certificate	41	14
Demurrer	11	5
Demurrer, order overruling	12	6
Judgment	21	8
Judgment-roll, certificate to	24	9
Summons	1	2
Verdict	20	8
Writ of error	c	1

a UNITED STATES OF AMERICA, *ss:*

To Samuel Jemison, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1874, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of California, wherein George Treat and J. M. Dickerson are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the United States Supreme Court this twenty-eighth day of March, A. D. 1874, and of the Independence of the United States the ninety-eighth.

[SEAL.] LORENZO SAWYER,
Circuit Judge.

b Service of a certified copy of the within citation admitted this March 30, 1874.

CLARK CHURCHILL,
Atty. for Defendant in Error S. Jemison.

(Indorsed:) 1173. United States Supreme Court. George Treat and J. M. Dickerson, plffs. in error vs. Samuel Jemison, deft. in error. Citation. Filed 30 March, 1874. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. clerk.

c UNITED STATES OF AMERICA. *ss:*

The President of the United States of America to the judges of the the circuit court of the United States for the district of Caliifornia, in the ninth judicial circuit, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between George Treat and J. M. Dickerson, plaintiffs in error, and Samuel Jemison, defendant in error, a manifest error hath happened to the great damage of the said plaintiffs in error, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under you seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this second Monday of October, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-eighth.

Attest:
[SEAL.]

L. S. B. SAWYER,
By J. F. O'BEIRNE,
D'y clk. of U. S. Cir. Court Cala.

d The answer of the judges of the circuit court of the United States for the district of California.

The record and all proceedings of the plaint, whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the court.

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Dep. Clk.*

(Indorsed:) 1173. United States Supreme Conrt. George Treat and J. M. Dickerson, plffs. in error, vs. Samuel Jemison, deft. in error. Writ of error. Filed 30 March, 1874. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. clk.

1 UNITED STATES OF AMERICA:

In the circuit court of the United States of the ninth circuit in and for the district of California:

SAMUEL JEMISON, PLAINTIFF,
vs.
GEORGE TREAT AND J. M. DICKERSON, DEFENDANTS.

Action brought in the said circuit court and the complaint filed in the office of the clerk of said circuit court in the city of San Francisco.

Summons.

The President of the United States of America, greeting:

To George Treat and J. M. Dickerson, defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiffs, in the circuit court of the United States, ninth circuit, in and for the district of California, and to file your plea, answer, or demurrer to the complaint filed therein (a copy of which accompanies this summons) in the office of the clerk of said
2 court in the city and county of San Francisco, within ten days after the service on you of this summons; if served in this county, or if served out of this county then within forty days, or judgment by default will be taken against you.

The said action is brought to recover from you on two certain promissory notes, fully and at large set out in the original complaint on file herein, the sum of $2,695.00, and interest on the sum of $1,750.00 from the 10th day of August, A. D. 1872, at the rate of one per cent. per month, and interest on the sum of $945.00 from the 16th day of April, A. D. 1873, at the rate of one per cent. per month, and that the judgment for said amounts, and every part thereof be made payable in gold coin of the Government of the United States; also, to recover plaintiff's costs and disbursements in this behalf made and expended, and for such other and further relief as plaintiff may be entitled to have, and if you fail to appear and plead, answer or demur, as herein required, judgment by default will be entered against you and each of you.

Witness the honorable N. Clifford, associate justice of the Su-
3 preme Court of the United States of America, this eighth day of

August, in the year of our Lord one thousand eight hundred and seventy-three, and of our Indepencence the ninety-eighth.

[SEAL.] LORENZO S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

(Endorsed:)

OFFICE OF U. S. MARSHAL,
District of California.

I hereby certify that I personally served a true copy of the within summons together with a copy of the complaint therein mentioned, upon George Treat, on the 9th day of August, 1873, and a true copy of the within summons upon J. M. Dickerson, on the 12th day of August, 1873, both in the city and county of San Francisco.

WM. GOUVERNEUR MORRIS,
U. S. Marshal.
By B. J. ACKERMAN, *Deputy.*

CLARK CHURCHILL, *Plaintiff's Attorney.*

4 Filed August 12th, 1873.
L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

5 *Complaint.*

In the circuit court of the United States of the ninth judicial circuit in and for the district of California.

SAMUEL JEMISON, PLAINTIFF,
vs.
GEORGE TREAT AND J. M. DICKERSON, DEFENDANTS. } Complaint.

Now comes Samuel Jemison, the plaintiff in the above-entitled cause, and complains of George Treat and J. M. Dickerson, the defendants therein, and for cause of action alleges and shows to the court—

I.

That during all the several periods of time hereinafter stated said plaintiff was and still is a citizen of the State of Nevada, and that the defendants herein were, during all the several periods of time hereinafter stated, and they still are, citizens of the State of California, resident within the jurisdiction of this court.

II.

That, therefore, to wit, on the tenth day of August, A. D. 1872, at Schellburn, White Pine County, State of Nevada, the said de-
6 fendants duly made and executed their certain promissory note in writing, of which the following is a true copy, viz:

"$1,750.00. Sixty days after date, for value received, we, either or both of us, promise to pay Samuel Jemison or order the sum of one thousand seven hundred and fifty dollars ($1,750.00) in U. S. gold coin, with interest at one per cent. per month.

"Schellburn, White Pine Co., Nev."

"August 10th, 1872.

(Signed) "J. M. DICKERSON.
"GEORGE TREAT."

And the said defendants then and there duly stamped the said promissory note with United States internal-revenue stamps of the proper denomination and value as required by law, and cancelled said stamps, and for a good, valuable, and adequate consideration did deliver the said promissory note to Samuel Jemison, the said plaintiff, who thereby became the owner and holder thereof, and from thence hitherto said plaintiff has been, and he still is, the owner and holder of the said promissory note; that the said promissory note has not, nor has any
7 part thereof, been paid; that there is now due, owing, and unpaid from said defendants to said plaintiff thereon the sum of one thousand seven hundred and fifty dollars in gold coin of the United States, and interest thereon in such gold coin from the 10th day of August, A. D. 1872, at the rate of one per cent. per month.

III.

And for a further and separate cause of action, plaintiff complains and alleges that on the 16th day of April, A. D. 1873, at the city and county of San Francisco, State of California, the said defendant, J. M. Dickerson, made and executed his certain promissory note in writing, of which the following is a true copy, viz:

"$945.00. SAN FRANCISCO, *April 16th*, 1863.

"On the eighteenth of June, 1873, at three o'clock p. m., of that day, (no grace) for value received, in gold coin of the Government of the United States, I promise to pay to the order of George Treat, at the Bank of California, in this city, nine hundred and forty-five dollars, with interest from date, at the rate of one per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

(Signed) "J. M. DICKERSON."

8 And then and there duly delivered the same to the defendant, Gerge Treat, who thereby became the holder thereof, that thereafter, and before the maturity of said note, the said George Treat duly indorsed the said promissory note in blank, and delivered the same to one Nelson Allen, who thereby became the owner and holder thereof; that thereafter and before the maturity of the said promissory note, the said Nelson Allen, for a good, valuable, and adequate consideration, delivered the said promissory note to said plaintiff, who thereby became the owner and holder thereof; and said plaintiff alleges (upon information and belief) that at maturity said note was duly presented for payment at the Bank of California, and payment thereof demanded from the paying-teller of said bank; and also to the defendant J. M. Dickerson for payment, and payment thereof duly demanded of the said Dickerson, but the said note was not, nor was any part thereof, paid. Whereupon the said note was duly protested by E. V. Joice, esquire, a notary public duly commissioned and sworn in and for the city and county of San Francisco, State of California, for non-payment; that thereafter
9 notice of the said protest, demand*ed* and non-payment of the said promissory note was duly given to the defendant George Treat; that said plaintiff is now the owner and holder of said note, and there is due to him thereon from the said defendants the sum of nine hundred and forty-five dollars, with interest thereon from the 16th day of April, A. D. 1873, at the rate of one per cent. per month, both of which said principal and interest payable in gold coin of the Government of the United States.

Wherefore said plaintiff prays judgment against said defendants for the sum of two thousand six hundred and ninety-five dollars, and interest on the sum of one thousand seven hundred and fifty dollars from the tenth day of August, A. D. 1872, at the rate of one per cent. per month, and interest on the sum of nine hundred and forty-five dollars from the sixteenth day of April, A. D. 1873, at the rate of one per cent. per month, and that said judgment, and every part thereof, be made payable in gold coin of the Government of the United States; for his costs and disbursements in this behalf made and expended, and for such other and further relief as plaintiff may be entitled to.

CLARK CHURCHILL,
Plff's Atty.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Samuel Jemison, being first duly sworn, deposes and says that he has heard read the foregoing complaint and knows the contents thereof; that he is the plaintiff named in said cause; that said complaint is true, of his own knowledge, except as to those matters which are therein stated on his information and belief, and that as to those matters he believes it to be true.

SAMUEL JEMISON.

Subscribed and sworn to before me this 30th day of July, A. D. 1873.

JOS. F. O'BEIRNE,
U. S. Commissioner, Dist. of Cala.

(Endorsed:) Filed 8th August, A. D. 1873.

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE,
Deputy Clerk.

11 In the circuit court of the United States of the ninth judicial circuit in and for the district of California.

SAMUEL JEMISON, PLAINTIFF,
vs.
GEORGE TREAT AND J. M. DICKERSON, DEFENDANTS.

Demurrer.

The defendants, George Treat and J. M. Dickerson, demur to the complaint in this action upon the ground that said complaint does not state facts sufficient to constitute a cause of action.

J. C. STEBBINS,
Atty. for Defts.

SAN FRANCISCO, *August 12th*, 1873.

(Endorsed:)

Service of a copy of the within demurrer admitted this 12th Aug., 1873.

CLARK CHURCHILL,
Plffs.' Atty.

Filed 12th August, 1873.

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE,
Deputy Clerk.

12 *Order overruling demurrer.*

At a stated term of the circuit court of the United States of America of the ninth judicial circuit in and for the district of California, held at the court-room in the city of San Francisco, on Monday, the twenty-fifth day of August, in the year of our Lord one thousand eight hundred and seventy-three.

Present, the honorable Lorenzo Sawyer, judge.

SAMUEL JEMISON
vs.
GEORGE TREAT AND J. M. DICKERSON.

By consent of counsel, ordered demurrer herein overruled, and defendants granted fifteen days within which to answer the complaint herein.

I hereby certify that the foregoing is a full and true copy of
13 an original order made and entered in the above-entitled action,
Attest my hand and the seal of said circuit court, this 24th day of March, A. D. 1874.

[SEAL.]

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Deputy Clerk.

14 *Answer.*

In the circuit court of the United States of the ninth judicial circuit in and for the district of California.

SAMUEL JEMISON, PL'FF,
vs.
GEORGE TREAT AND J. M. DICKERSON, DEFEND'TS.

The defendants, George Treat and J. M. Dickerson, answering the complaint herein, deny that for a good, valuable, or adequate consideration, or any consideration, they did deliver the promissory note first above, to wit, in complaint set forth, to Samuel Jemison, the said plaintiff, or that he is the owner or holder thereof.

They deny that there is now due, or owing, or unpaid to plaintiff from defendants, the sum of one thousand seven hundred and fifty dollars with interest, as alleged, or any sum whatever in gold coin or otherwise.

And for a further answer to said complaint and said second
15 alleged cause of action, these defendants deny, upon information and belief, that Nelson Allen, mentioned in said complaint, ever became the owner or holder of the said note secondly set forth in said complaint, dated April 16th, 1873, for the sum of $945.00.

These defendants, upon their information and belief, deny that before the maturity of said note, the said Nelson Allen, for a good, valuable, or adequate consideration, or any consideration whatever, delivered the said last-mentioned promissory note to said plaintiff, or that said plaintiff thereby became the owner or holder thereof, or that he is now the holder or owner thereof, and these defendants deny that there is due thereon from the said defendants the sum of $945.00 and interest, as alleged, or any sum of money whatever, in gold coin or otherwise.

And for a further and separate answer and defence, these defendants aver that said notes in complaint mentioned, and each thereof, are void

and of no effect, as well otherwise as because the same were obtained from these defendants by fraud and fraudulent misrepresenta-
16 tions, done and made by said plaintiff and other parties with him conspiring and conniving together to cheat and defraud these defendants, and also because there never was any consideration for the said notes, or either thereof, given, or, if given, such pretended consideration failed before the commencement of this action, as hereinafter fully set forth, to wit:

That on or about the 10th day of August, 1872, at Schellburn, in complaint mentioned, in the State of Nevada, the said plaintiff and said Nelson Allen, together with one E. J. De Mills and one McDermot, conspiring and conniving together to cheat and defraud these defendants, did then and there fraudulently represent and state to these defendants dthat they were the owners of a certain silver-mine, there situate an known and called the "Albert," of great value, and that the ore of said mine would assay and produce upon an average ($50) fifty dollars per ton, when the plaintiff and said Allen, said De Mills and McDermott then well knew that the ore from said mine would not produce or assay three ($3) dollars per ton and would not pay expenses, and was entirely worthless.

17 That these defendants, confiding in the truth of the said representations, and supposing that the said ore was of the value, and would assay and produce as much fifty ($) dollars per ton, on an average, as represented, were induced to and did purchase the said mine at and for the price of twelve thousand dollars U. S. gold coin, and did then and there pay down, to wit, in cash therefor to the said plaintiff, said Allen, said De Mills, and McDermot, the sum of (6,000) six thousand dollars, and did then and there give promissory notes for the balance of the purchase-price of said mine; that the note for $1,750, firstly set out in the complaint, was one of the notes so given for a part of the purchase-price of said mine.

That the note secondly set forth in said complaint, for the sum of $945, is a note given to said Allen on taking up a certain other promissory note of these defendants, by him then held for the sum of $1,750.00, which was also given as a part of the purchase-price or consideration for said mine, and was so taken up by paying a portion thereof in cash and giving the note last mentioned for the balance, to wit, the sum of
18 $945.00.

These defendants further aver that said mine so purchased by these defendants is, and was at the time of said purchase, utterly worthless and of no value whatever, and the ore therefrom will not produce enough to pay expenses for taking out the same and milling, nor more than three dollars ($3) per ton, all which the said plaintiff, and said Allen, De Mills, and McDermot well knew at the time of the execution of said notes.

That said notes were so given and obtained without any other consideration therefor than said sale, and these defendants were induced to make the said purchase of said mine, and execute said notes, solely on the faith of and believing the said fraudulent representations of said plaintiff and his said confederates as aforesaid, and these defendants are ready and willing to re-convey said mine to the said Jemison, Allen, De Mills, and McDermot.

Wherefore these defendants pray that said promissory notes, and each thereof in complaint mentioned, be adjudged void, and be decreed to be delivered up and cancelled.

19 J. C. STEBBINS,
Atty. for Defendants.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

George Treat, being sworn, says he is one of the defendants herein; that he has heard read the foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

GEORGE TREAT.

Sworn to before me September 13th, 1873.
[SEAL.] F. F. THIBAULT,
Notary Public.

(Endorsed:) Filed 15th September, 1873. L. S. B. Sawyer, clerk, by J. O'Beirne, deputy clerk.

20 *Verdict.*

In the circuit court of the United States 9th circuit district of California.

SAMUEL JEMISON
vs.
GEORGE TREAT ET AL. } No. 1173.

We, the jury, find for the plaintiff in this action in the full amount of three thousand one hundred and thirty-eight $\frac{74}{100}$ dollars in United States gold coin.

W. F. HITCHCOCK,
Foreman.

(Endorsed:) Filed 18 March, 1874. L. S. B. Sawyer, clerk.

21 *Judgment.*

In the circuit court of the United States of the 9th judicial circuit in and for the district of California.

SAMUEL JEMISON, PLAINTIFF,
vs.
GEORGE TREAT AND J. M. DICKERSON, DEFENDANTS. } No. 1173.

This cause having come on regularly for trial on the 16th day of March, A. D. 1874, being a day in the February term, A. D. 1874, of said court, before the court and a jury of twelve men duly impaneled, Clark Churchill, esq., appearing on behalf of plaintiff, and J. C. Stebbins and W. H. Tompkins, esq's, on behalf of defendants, and the trial having been proceeded with upon the 17th and 18th days of said March, and witnesses on behalf of plaintiff and of the defendants having been sworn and examined, and the evidence being closed, the cause, after arguments of counsel and the instructions of the court, having been submitted to the jury, and the jury having subsequently rendered the following verdict:

22 We, the jury, find for the plaintiff in this action in the full amount of three thousand one hundred and thirty-eight $\frac{74}{100}$ dol

lars in United States gold coin, and the court having thereupon ordered that judgment be entered herein in accordance with said verdict:

Now, therefore, by virtue of the law, and by reason of the premises aforesaid, it is considered by the court that Samuel Jemison, plaintiff, do have and recover of and from George Treat and J. M. Dickerson, defendants, the sum of three thousand one hundred and thirty-eight $\frac{74}{100}$ dollars in United States gold coin, and his costs in this behalf expended, taxed at one hundred and ninety-six $\frac{05}{100}$ dollars.

Judgment entered the 18th day of March, A. D. 1874.

L. S. B. SAWYER, *Clerk.*

A full, true, and correct copy of the judgment entered in the action above entitled, in judgment-register C. D., No. 2, page 31, of said circuit court.

Attest, &c.

L. S. B. SAWYER, *Clerk.*

23 [SEAL.] By J. F. O'BEIRNE, *Deputy Clerk.*

(Endorsed:) Filed 18 March, 1874. L. S. B. Sawyer, clerk.

24 *Certificate of judgment-roll.*

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit in and for the district of California, do hereby certify that the foregoing papers attached together constitute the judgment-roll in the cause therein entitled.

Attest my hand and the seal of said circuit court this 24th day of March, A. D. 1874.

[SEAL.]

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

(Endorsed:) Judgment-roll. Filed 24 March, 1874. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

25 *Bill of exceptions.*

In the circuit court of the United States of the ninth judicial circuit in and for the district of California.

SAMUEL JEMISON
v.
GEORGE TREAT AND J. M. Dickerson.

This cause came on regularly for trial on the 16th day of March, 1874, it being a day in the February term of said court, before the court and a jury of twelve men duly empanelled; Clark Churchill, esq., appearing on behalf of the plaintiff, and W. H. Tompkins and J. C. Stebbins appearing on behalf of the defendants.

The plaintiff's counsel, in order to maintain the issues upon his part, read in evidence the promissory notes set forth in the said complaint, and also proved that plaintiff paid to Nelson Allen, the payee named in the second note set forth in said complaint, a valuable consideration therefor, to wit, the sum of about nine hundred dollars.

The counsel for the plaintiff here rested his cause.

26 And the counsel for the defendants, to maintain and prove the

issues upon the part of the defendants, called George Treat, one of the defendants, who testified that on or about the 10th day of August, 1872, the defendants bought of the plaintiff, Jemison, one Nelson Allen, and two other persons, a mining-claim, called the "Albert" situated in White Pine County, Nevada, and agreed to pay therefor twelve thousand dollars; that one-half of said sum was paid down, and notes signed and executed by defendants, were given for the other half of the purchase-price of said mining-claim. That the note first set forth in said complaint for $1,750 was at the same time also given to the said Nelson Allen as a part of the purchase-price of said claim; the said Jemison, Allen, F. A. McDermid, and one De Mill claimed to be owners of said mining-claim, and all made sale thereof to defendants. This witness further testified that subsequent to the delivery of the note of defendants to the said Nelson Allen for the said sum of $1,750,
27 part payment of the same was made to said Allen, and the note secondly set forth in said complaint was given for the balance, and it appeared that at the time of said part payment, the giving of said note for the balance, said defendant knew as much about the value of said mine as when this suit was brought, and that he made said payment and gave said note for balance without making any objection on the ground of fraud in the sale.

It appeared, also, from the testimony that, some months prior to the purchase of said Albert mining claim, the defendants had purchased from the same parties a mining-claim called the "Tehama mine." In answer to a question as to how the two mines were located with reference to each other, defendants' witness Ross said, "The Albert is south of the Tehama, across a cañon, on the next hill;" and, to the question "Does the Albert adjoin the Tehama mine?" he said, "Well, I think they do—there may be a little space between them. I think they are located so that they adjoin one another, but I should judge the works to be between four and five thousand feet apart." Hollowell, one of the defendants' witnesses, in answer to the question "How the Albert claim
28 was situate with regard to the Tehama claim?" said, "On the south side of the cañon dividing the two claims." McDonald, another of defendants' witnesses, at first said the work done on the two claims, Tehama and Albert, was about two thousand feet apart on opposite sides of the ravine. He afterwards said that he had both claims surveyed for a patent, and three thousand feet would include both from extreme north to extreme south of said claims, and said that when he spoke of the work done on the two claims being two thousand feet apart, he meant the "main working." He said there had been some work done 180 feet apart.

The defendants offered to prove by said Treat that, at the purchase of the Tehama mine, the vendors made representations as to richness of that mine which turned out to be false; that they had assays made which yielded from fifteen to one hundred and fifty dollars per ton, also, to prove that the Tehama mine turned out not to be rich enough to pay for working, and that after numerous tests made the Tehama mine was abandoned as worthless.

The plaintiff objected, on the ground that the testimony offered
29 is irrelavent and immaterial. The court being of the opinion that the representations made on a former occasion concerning a mining-claim situate with reference to the mine in question, as this appeared to be, was immaterial, and also inadmissible under the pleadings, there being no allegations in the answer of the representations made

about the Tehama mine, sustained the objection, and defendants excepted.

And upon similar grounds the court ruled generally, that it would not allow any testimony to be given by defendants as to the character of the Tehama mine, or the representations made in relation to its value by the plaintiff or his co-vendors before the sale of the same to the defendants, to which ruling the defendants duly excepted.

The defendants offered to show by the witness McDonald that there had been a mill put up on the said Tehama mine by the Tehama Mining Company, costing over eighty thousand dollars; that large expenditures of money had been made in purchasing and prospecting said Tehama mine, and it had all been abandoned because of its worthlessness. To which plaintiff objected as irrelavent and immaterial.
30 The court sustained the objection, to which ruling defendants duly excepted.

The defendants having rested, the plaintiff's counsel offered to show by the deposition of one of the defendants, and the testimony of the other in open court, that after the purchase of the said Albert mine by the defendants, that the defendants sold and conveyed one-half of the same to other parties for a sum greater than they, said defendants, paid the plaintiff and his co-vendors for the whole of it.

To this testimony the defendants' counsel objected because the same was irrelavent and incompetent.

The court overruled the objection, and did decide that the same was relavent and competent, to which, the said opinion and decision of the court, counsel for the defendants did then and there, on behalf of said defendants, except. And the plaintiff thereupon read from the deposition of J. M. Dickerson, one of the defendants, who deposed that George Treat, his co-defendant, and himself, shortly after they purchased the Albert mine, sold one-half of the said Albert mine for the sum of
31 fifteen thousand dollars, and that he received the money for it on his share and never repaid any part of it. The said George Treat also testified that he and his co-defendant, Dickerson, sold one-half of the Albert mine for either twelve or fifteen thousand dollars—he was not positive which sum.

The defendants then offered to prove by said Treat that the defendant Treat, after he and Dickerson had sold the said one-half interest of the Albert mine for $15,000, re-purchased a part of the mine so sold, and in that re-purchase he was out five thousand dollars, to which the plaintiff objected as irrelavent and immaterial. The court sustained the objection, and defendants duly excepted.

It further appeared that upon the sale of said Albert mining-claim to defendants, they entered into possession thereof, and continued in possession thenceforth till conveyed by them to other parties; that after the said sale of one-half thereof by said defendants for $15,000 the whole of said mine was conveyed by said defendants to the Albert Mining Company, a corporation organized for the purpose, and that the stock of said corporation was issued to the said defendants and
32 their vendees in proportion to their respective interests in said mine, and that said corporation thenceforth held said mine till and at the time of the commencement of this suit, so that it was not in the power of said defendants to re-convey said mine to said plaintiff and his co-vendors. It also appeared from the testimony of plaintiff, there being no testimony to the contrary, that the defendants never at any time offered to re-convey said mine to plaintiff and his co-vendors, and they never at any time before the commencement of this suit objected

to the payment of said notes on the ground of fraud, or alleged fraud in the sale; that they promised to pay from time to time, and that at the time plaintiff purchased said note from Allen he had no notice of any contemplated defense to a suit.

There was testimony given by defendants to the effect that said Albert mine turned out not to be rich enough to pay for working, and that it was consequently valueless as a mine.

The plaintiff, on the other hand, testified that he was one of the
33 original locators; that before the sale there was every indication that there might be a mine; that there was "a good deal of rich rock on the surface; that he got assays of $1,000 per ton of samples got on the mines;" that there had been 8 or 10 days' work done altogether; that a cut had been "run a few feet, which showed mineral all through;" that they "took out about half a ton of good rock."

The defendant Treat testified on his own behalf, and, among other things, as follows, to wit: "When I purchased Albert mine—parties themselves present, Jemison, Allen, McDermid, and De Mill—I understood at time continuation of the Tehama, and understood that Tehama was good. Don't recollect what was said at any time before sale as to character of mine. Considerable said. Wanted us to have it, as we owned the adjoining mine. Make nice property the two together, and would prefer us to have it. Am not positive if plaintiff was present; think he was. De Mill was the spokesman; said as we owned the other property we ought to have this. Other parties were after it. Said the ore would go from $15 to $150 per ton. On their representations and
34 supposition that Tehama good mine that I bought. If I had not supposed Tehama good would not have bought on their representations. Found a shelf of ore on top; when got through that found it barren. Sank 27 feet and found it barren; that, with some seams in other parts, all; found no other ore on it.

Cross-examination:

De Mill at Shell Creek when he told me it went $15 to $150 a ton. He said had it assayed. I had had two specimens assayed. I thought Tehama a rich mine, and thought Albert same ledge. I went and saw the Albert mine; don't think Jemison present when De Mill told me assayed $15. I was up there before purchase; discovered it no value in October. Paid $6,000 cash for Albert mine and notes for balance. I paid my portion of the De Mill note. Paid all McDermid note. Paid Allen about time new note bears date. When I paid these notes knew as much as I know now about the value of mine.

Had opportunity to examine mine and take out ore if I desired. De
35 Mill told me rock go $15 to $150 a ton at mine or Shellburn. Mr. Jemison don't think present. I understood the rock would assay—poor rock $15 and rich $150. Did not tell me how much of this rock there was. Did not say could get out one ton. Did not state what could get out. Had been a few days work done on mine, 3 or 4 feet blasted out. I went and looked at it. Took samples at dump and had them assayed. Don't know where came from. Came to San Francisco and had them assayed. Went back and looked at mine before I purchased. Did not buy it on the simple assertion of De Mill that it would pay $15 to $150 per ton. I had bought Tehama before this—within a few months before this. Dickerson told me it was for sale then. I went and looked at it. Had been there two days before I purchased. Was there once before and then 3 or 4 days. Returned to San Francisco, and absent probably a month before I returned. Then went up and stayed a few days second time. Cannot state the exact words of De Mills. I

thought favorably of De Mills at the time, and of all of them. Saw ore when I went to look at the mine. After I bought I blasted down through it.

36 Re-direct:

I bought on the representations made by these parties and its appearance. They said they thought it was a valuable mine, and, having one, ought to have both. They thought it same mine as Tehama, and ought to have both. I partially bought on representations.

In answer to Churchill's question, whether he would buy a costly mine on the representations of parties he had known but a few days, said he would not wholly.

The said issues, and the evidence given on the trial thereof under the charge of the court, were then submitted to the jury, and the jury found a verdict for the plaintiff for dollars damages and costs.

And because none of the exceptions hereinbefore contained taken on behalf of defendants, offered and made to the opinion and decision of the court, do appear upon the record of said trial, therefore, on the prayer of the said defendants by their counsel, the said court has
37 hereunto set his hand and seal this 11th day of July, A. D. 1874.

LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Filed 10 July, 1874. L. S. B. Sawyer, clerk.

38 *Bond.*

In the Supreme Court of the United States of America.

SAMUEL JEMISON
vs.
GEORGE TREAT AND J. M. DICKERSON.

Know all men by these presents that we, George Treat and J. M. Dickerson as principals, and Samuel L. Theller and John Treat as sureties, are held and firmly bound unto Samuel Jemison in the sum of five thousand dollars, to be paid to the said Samuel Jemison. To which payment well and truly to be made we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals and dated the twenty-seventh day of March, A. D. one thousand eight hundred and seventy-four.

Whereas the above-named George Treat and J. M. Dickerson have prosecuted a writ of error to the Supreme Court of the United
39 States of America to reverse the judgment rendered in the above-entitled action by the circuit court of the United States of America of the ninth judicial circuit for the district of California:

Now, therefore, the condition of this obligation is such that, if the above-named George Treat and J. M. Dickerson shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

GEORGE TREAT. [SEAL.]
SAMUEL L. THELLER. [SEAL.]
JOHN TREAT. [SEAL.]

Signed, sealed, and delivered in the presence of—
JOS. F. O'BEIRNE.

UNITED STATES OF AMERICA,
District of California, ss:

Samuel L. Theller and John Treat being duly sworn, each for himself deposes and says that he is a householder within said district, and is worth the sum of five thousand dollars exclusive of property ex-
40 empt from execution, and over and above all debts and liabilities.

SAMUEL L. THELLER.
JOHN TREAT.

Subscribed and sworn to before me this 27th day of March, A. D. 1874

JOS. F. O'BEIRNE,
U. S. Comm'r Dist. of Cala.

(Endorsed:)

I hereby approve both the form of the within bond and the sufficiency of the sureties thereon.

San Francisco, 27th March, 1874.

LORENZO SAWYER,
U. S. Circuit Judge.

Filed March 28th, 1874. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

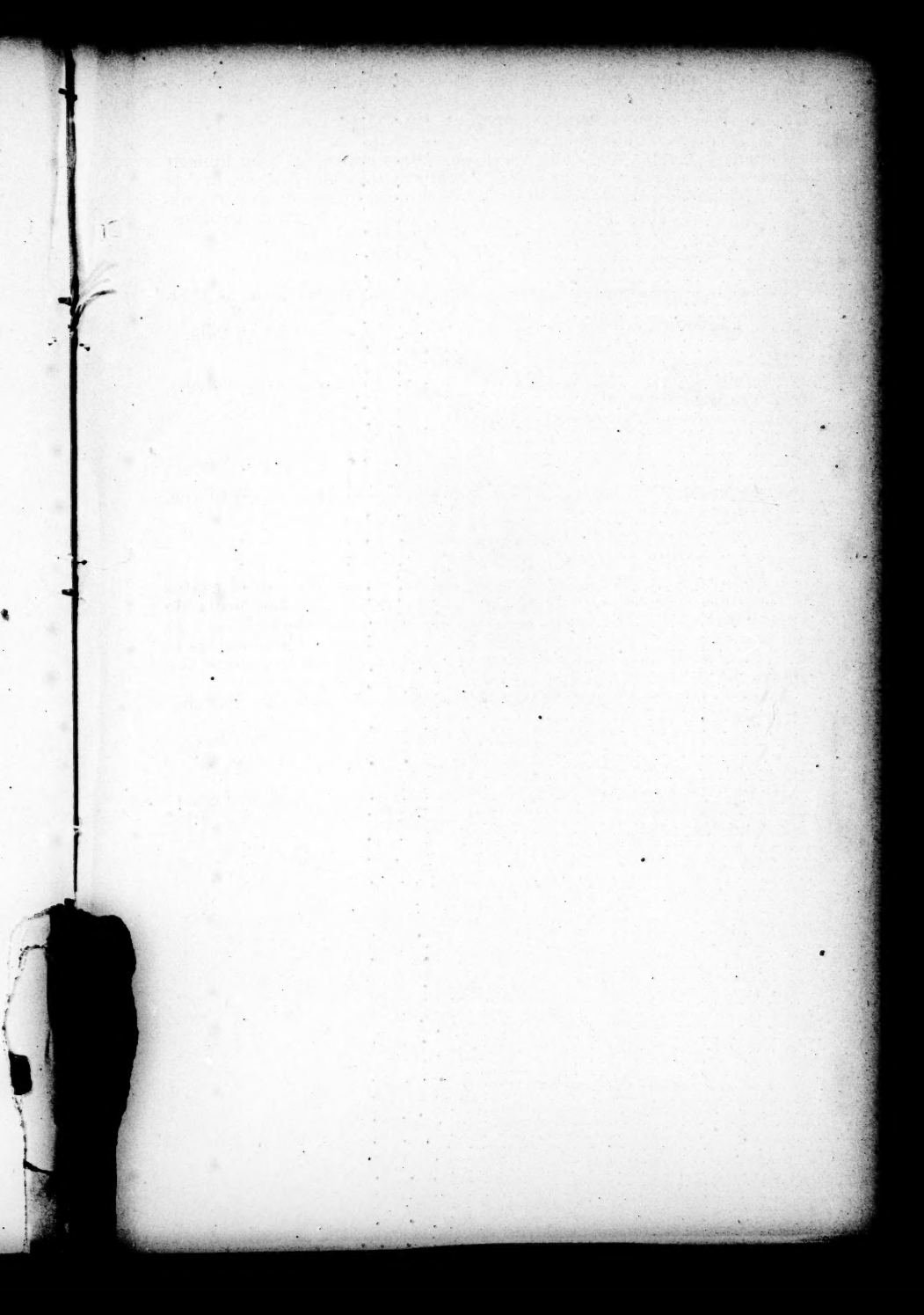
41 UNITED STATES OF AMERICA,
District of California, ss:

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit in and for the district of California, do hereby certify that the foregoing 40 written pages, numbered from 1 to 40, both inclusive, are a true copy of the record and of all proceedings in the cause therein entitled and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of the said circuit court this 28th day of August, A. D. 1874.

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Dep. Clk.*

(Indorsement on cover:) No. 721. George Treat and J. M. Dickerson, plaintiffs in error, vs. Samuel Jemison. California C. C. U. S. Filed 9th November, 1874.



No. 110,721.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

GEORGE TREAT, ET AL,

Plaintiffs in Error.

vs.

JAMISON,

Defendant in Error.

Brief of Plaintiffs in Error.

NATHANIEL BENNETT,

Attorney and Counsel for Plaintiffs in Error.

SAN FRANCISCO:

E. BOSQUI & CO., PRINTERS, LEIDESDORFF ST. COR. CLAY,

1874

IN THE SUPREME COURT

OF THE

UNITED STATES.

GEORGE TREAT, ET AL., *Plaintiffs in Error.* vs. SAMUEL JAMISON, *Deft. in Error.*	110,721.

Brief of Plaintiffs in Error.

We preface our points and authorities with a brief statement of facts.

In the early part of the summer of 1872, Samuel Jamison, the plaintiff, Nelson Allen, and two other persons by the name of De-Mill and McDermid, all of whom are mentioned in the Bill of Exceptions in this case, were or claimed to be, the owners of two several mines situate at Shelburn, White Pine County, in the State of Nevada. These two mines were separated from each other by a small cañon or ravine not more than one hundred and eighty feet in width, and probably not so wide, as it

appeared from the testimony in the Bill of Exceptions; that certain work was done upon the mine called the Tehama Mine, distant about one hunhundred and eighty feet from other work done on the Albert Mine, so called. These two mines, although taken up and treated and disposed of as two separate mines, nevertheless in reality constituted but one continuous ledge—broken, as is frequently the case with ledges in Nevada and California, by a narrow cañon or ravine.

It appears from the testimony, that sometime in the summer of 1872, the persons above named, to wit: Jamison, Allen, De-Mill and McDermid, sold to the defendants, Treat and Dickinson, the Tehama Mine, and that afterwards, and on or about the 10th of August, 1872, the same persons sold to the defendants the Albert Mine, for the sum of twelve thousand dollars, of which sum six thousand dollars were paid in cash, and the remainder in four several promissory notes, three of which were for seventeen hundred aud fifty dollars each, and the other for seven hundred and fifty dollars, all dated on the said 10th of August, 1872. The said several notes for $1750 each were delivered severally to three of the said persons above named, and the other note, for seven hundred and fifty dollars, to the other of the persons above named; two of the notes were paid, and a part of another note, made payable to Allen, one of the said vendors above named, was also paid, and a new note for the remainder, to wit, for the sum of $945, was executed by Dickinson, one of the defendants, payable to Treat, the other defendant, and by him endorsed

to said Allen, and by said Allen to the plaintiff. This last mentioned note for $945, and one of the original notes for $1750, constitute the two notes in suit.

POINTS AND AUTHORITIES.

Point I.

It appears, from the Bill of Exceptions, that defendants offered to prove that, just previous to the sale of the Tehama Mine, the vendors above named, represented to Treat and Dickinson, the purchasers, in substance, that they had worked the Tehama Mine; that they had had numerous assays made of ore taken from said mine; that said ore assayed well, and yielded at the rate of from $15 to $150 per ton. The defendants further offered to prove, that after numerous tests made subsequent to the purchase of the Tehama Mine, it turned out not be rich enough to pay for working, and was abandoned as worthless. Proof of the above testimony was objected to by plaintiff as irrelevant; the Court sustained the objection, and the defendants excepted.

The defendants also offered to prove that there had been a mill put up on the Tehama Mine, costing over eighty thousand dollars, by the Tehama Mining Company; that large expenditures of money had been made in purchasing and prospecting said Tehama Mine, and it had all been abandoned, because of its worthlessness. Proof of the above

testimony was objected to by the plaintiff as irrevelant; the objection was sustained by the Court, and defendants excepted.

It appeared, from the testimony of defendant Treat in substance, that at the time he purchased the Albert Mine, all the vendors above named, to wit, Jamison, Allen, McDermid and De-Mill, were present; that he understood from them that the Albert Mine was a continuation of the Tehama Mine; that considerable was said about the character of the mine, and that they, the vendors, wanted the defendants Treat and Dickinson, to have the Albert Mine, inasmuch as they were already the owners of the "adjoining mine"—that is, the Tehama Mine. That both together would make a nice property, and that they, the vendors, would prefer to have Treat and Dickinson own the Albert Mine. The witness afterwards says, that he is not positive that the plaintiff was present; that De-Mill was the spokesman, and said that as we, the defendants, owned the other property—that is, the Tehama Mine, we ought to have this (meaning the Albert Mine); that other parties were after it, the Albert Mine; that the ore of it would go from $15 to $150 per ton, and that on these representations, principally, the defendants bought the Albert Mine; and that, if he had not supposed the mine to be good, he would not have bought on their representations. That afterwards, on testing the mine, he found a shelf of ore on top, and that when he got through that he found it barren; that they sank twenty-seven feet and found it barren;

that there were seams of ore, and the other parts all barren.

On cross-examination, the witness stated in substance, that when De Mill told him that the ore went from $15 to $150 per ton he had had it assayed; that the witness thought the Tehama Mine a rich mine, and thought that the Albert Mine was on the same ledge; that he discovered it of no value in October, meaning the October succeeding the purchase of the Albert Mine.

On re-direct examination, the witness further substantially stated, that he bought on the representations made by the vendors, and the appearance of the mine. They said they thought it, the Albert Mine, was a valuable mine, and that we having one ought to have both; that they thought the Albert Mine the same mine as the Tehama Mine, and that we ought to have both of them, and that he partially bought on such representations made by the vendors.

From the foregoing testimony, together with that which was offered by the defendants and objected to, and exception taken, it appears that the vendors of the two mines made representations as to the character and value of the mines, which the testimony establishes to have been untrue. The defendants further offered to prove that these representations were false, which testimony was objected to, objection sustained and an exception taken. The offer to prove that the representations were false, includes within itself offer of proof of knowledge in the vendors that the representations were untrue.

The Court also made a general ruling under the objection of the plaintiff, that it would not allow any testimony to be given by defendants touching the character of the Tehama Mine or the representations made as to its value by the plaintiff and his co-vendors before the sale of the same to the defendants. This ruling also necessarily excluded all testimony on the part of the defendants, that the vendors knew at the time that they made the representations that they were untrue.

After this sweeping ruling of the Court it certainly could not have been incumbent upon the defendants to make a distinct offer to prove knowledge in the vendors of the untruth of their representations. The Court declares, in the strongest terms, that it will permit no evidenee to be given respecting the representations of the vendors; this certainly precludes any testimony in respect to their knowledge, and afterwards it would be a matter of supererogation, as well, as we think, disrespectful to the Court to have pressed our offer further.

This, according to our view, makes out a full defence on the ground of fraudulent representations; for all that is necessary to be shown, in order to maintain an action, or to sustain a defence, on the ground of fraudulent representations, is, that the representations were untrue; that the party making them knew them to be untrue, or had good reason to suppose them to be untrue; and that the party complaining sustained damage by reason thereof.

The whole law respecting frudulent representations is very ably reviewed with the citations of all the authorities in the "American Law Review" for April, 1869, commencing at page 430, vol. III. And if a party makes representations which impart a knowledge in him of facts when in truth he has no knowledge of the facts, and the representations are made with the intent that another shall rely on them, and those representations turn out to be false, it is as much a fraud as if the party making them knew them to be untrue.

Sharp vs. Mayor, etc., 40 Barb. 256 and 21st, New York, 238.

So, also, one who is induced to enter into a contract by false representations upon material points, may rescind the contract on discovery of the falsehood, whether it be fraudulent or *simply the result of mistake.* (Hutcheon vs. Johnson, 33 Barb., 392. 1st Parson's on Contracts, 416. Dart on Vendors and Purchasers, 43.)

The testimony shows that the Tehama and the Albert Mine were so intimately connected, both existing, in fact, upon one and the same ledge, broken only by a narrow ravine, and the two sales were so closely connected in point of time and between the same parties, and the representations having been apparently continued from the negotiation as to the purchase of the Tehama Mine down to the purchase of the Albert Mine, that it is clear that the vendors intended that the representations made by them, as to the Tehama Mine, should operate upon the minds of the defendants in the purchase of the Albert Mine, and should induce

such purchase, and also that such representations did operate upon the minds of the defendents and lead to their purchase of the Albert Mine; hence, the reason why all the representations in relation to the Tehama Mine should have been admitted in evidence. And cotemporaneous acts are always competent as evidence, to sustain a charge of fraud.

Allaire vs. Matthieu, 3 Johnson, 235.
Benhams vs. Cary, 11 Wend., 83.
Hall vs. Naylor, 18 New York, 588.
Cary vs. Hotaling and Hotaling, 1 Hill, 311.
Jackson vs. Timmerman, 12th Wend., 83.
French vs. White, 5 Duer, 254.
Simmons vs. Fay, 1st E. D. Smith, 107.
Derbrow vs. McDonald, 5th Bosworth, 130.
Lalor, vs. Fisher, 2d Robt., Supreme Court, 669.
Hubbard vs. Briggs, 31st N. Y., 518.
Amsden vs. Manchester, 40 Barb., 158.

Point II.

The Bill of Exceptions, taking both what was proved, and what was offered in evidence by the defendants, objected to, ruled out and excepted to, establishes the fact that both the Tehama Mine and the Albert Mine were utterly worthless; that they would not pay for the working. Indeed, the proposition seems to have been conceded by the plaintiff's counsel on the trial, as he offered no evidence to contradict or qualify the defendants' evidence on this question.

We assume, therefore, that the Albert Mine, as well as the Tehama Mine, was worthless—had, in fact, no exchangeable value whatever.

We understand the rule of law to be, that where the consideration of a promissory note is entirely worthless—good for nothing—and was so when the note was given, the fact constitutes a failure of consideration, and is a good defense to a suit on the note between the original parties, or against all subsequent parties who take the note with full notice and knowledge of the consideration.

See Gifford vs. Corville, 29 Cal., 592.
Smith vs. Richard, 13 Peters, 26.
Bennett vs. Judson, 21 N. Y.. 239.

Though Jamison, the plaintiff, is the indorser of the $945 note given to Allen by the defendant; yet, Jamison was himself one of the vendors of the mines, and knew all about the consideration for the notes.

One ground on which the defendants insisted that the testimony offered, that the Tehama Mine was not rich enough to pay for working, and that it had been abandoned for that reason, was competent and ought to be admitted, was that such testimony was proper to go to the jury as bearing on the question of the worthlessness of the Albert Mine. Such testimony strikes us as not too remote. Both mines being substantially on the same ledge and near each other, the fact that one was valueless was some evidence that the other was also good for nothing. And in this view, as the Court excluded the offered evidence as irrelevant and im-

material, the ruling was error on a material question, for which the judgment ought to be reversed.

The mine being worthless, it was not necessary for the defendants to offer to re-convey. (See authorities above cited under this point.)

Point III.

The Court permitted the plaintiff to prove, under the objection and exception of the defendants, that the defendants, shortly after they purchased the Albert Mine, sold one-half thereof for $15,000, received the money and never repaid it. This ruling of the Court cannot be sustained, as we respectfully submit. Upon the theory of the mine being worthless—a position, as we have seen, fully proved, the parties to whom the defendants sold may recover the consideration paid by them in a suit for that purpose brought against the defendants. That the defendants deceived and defrauded third parties, is no bar to their defense against notes given to the vendors of the Albert Mine, who had deceived and defrauded them. In other words, a wrong perpetrated by them is no excuse for a wrong committed against them.

Davis vs. Shields, 24 Wend., 322.
Dana vs. Hiedler, 12 New York, 40.
Muller vs. Eno, 14 N. Y., 597.
Comstock vs. Hutchinson, 10 Barb., 211.
Renauld vs. Pecke, 2d Hilt., 137.
18 Wend., 425.

Point IV.

But, if the testimony mentioned in the last point be admissible, then the testimony offered by the defendants and rejected by the Court, that Treat, after the sale of the Albert Mine by the defendants, repurchased a part of the same mine, and, in such repurchase, "was out five thousand dollars," ought to have been admitted. We do not see any escape from this conclusion. It would seem to follow necessarily that, if the former evidence was competent, the latter was likewise competent. This strikes us as being, at least, common sense.

Point V.

No rule of law required the defendants to object to the payment of any of the notes, as a necessary preliminary to being admitted to defend this suit. As to their alleged promises to pay, they were without consideration, and amounted to nothing.

Allaire vs. Whitney, 1st Hill, 484.
" " " 1st Comstock, 305.
" " " 4 Denio, 554.

NATHANIEL BENNETT,
Atty. and Counsel for Plff.
In Error.

No. 721

IN THE

SUPREME COURT

OF THE

UNITED STATES.

GEORGE TREAT, AND
J. M. DICKERSON,
Plaintiffs in Error.

vs.

SAMUEL JEMISON,
Defendant in Error.

Argument of Defendant in Error.

HOUGHTON & REYNOLDS,
W. W. FOOTE,
Of Counsel for Defendant in Error.

CLARK CHURCHILL,
Solicitor for Defendant in Error.

SAN FRANCISCO:
E. BOSQUI & CO., PRINTERS, LEIDESDORFF ST. COR. CLAY,
1874

IN THE SUPREME COURT

OF THE

UNITED STATES.

GEORGE TREAT and J. M. DICKERSON, *Plaintiffs in Error.* vs. SAMUEL JEMISON, *Defendant in Error.*	No. 721.

ARGUMENT OF DEFENDANT IN ERROR.

We do not propose to make any argument in behalf of the defendant in error further than by simply stating the case, and asking this Honorable Court to affirm the judgment of the Court below with damages.

I.

STATEMENT OF THE ISSUES.

This action was brought in the Court below by the defendant in error against the plaintiffs in error to recover some $2750, besides interest and costs upon two promissory notes which are set out in the complaint.

One of said notes was in the complaint alleged to have been made by Treat and Dickerson for the

sum of $1750, with interest, etc., Aug. 10th, 1872, payable to Jemison, and the other was alleged in the complaint to have been made April 16th, 1873, by Dickerson (one of plff's in error) for $945, and interest, etc., payable to Treat (the other plff. in error). And that said Treat thereupon and before maturity endorsed and delivered said note to one Allen; that thereafter, and before maturity, said Allen, for a good, valuable and adequate consideration, delivered said note to Jemison (the defendant in error). See the complaint in the record on file.

The answer did not deny the execution and delivery of the notes as alleged in the complaint, but alleged substantially that August 10th, 1872, Jemison (plff. in Court below) and three others, viz., Allen, De-Mill and McDermid, had sold to Treat and Dickerson a certain mine called the "Albert" for $1200; that Treat and Dickerson had paid one-half of said note in cash, and had given their notes for the other half, and that the note firstly set out in the complaint was one of said notes, and the note secondly set out in the complaint was a note given in part payment of (or in exchange for) another of said notes, which had originally been given in part payment for said "Albert" Mine to said Allen, and the answer further alleged that the vendors of said "Albert" Mine fraudulently represented that the ore of said mine would assay fifty dollars per ton; whereas, in fact, said ore would not assay three dollars per ton, and that Treat and Dickerson (the defts. below) confiding in the truth of said representations, were induced to purchase said "Albert" Mine, and agreed to pay the above named

price therefor, and to give the said notes in part payment of the same. And the answer concluded by alleging: "These defendants are ready and "willing to reconvey said mine to said Jemison, "Allen, De-Mills and McDermid," and prayed that the said notes be adjudged void and be delivered up and cancelled. (See the answer in the record.)

II.

STATEMENT OF THE EVIDENCE.

On the trial the plaintiff introduced the original notes in evidence, and proved that the plaintiff paid to Nelson Allen, the payee named in the second note set forth in the complaint, the sum of about nine hundred dollars for said note. (See commencement of Bill of Exceptions in record.)

George Treat (one of the plaintiffs in error and of defendants below) was then introduced as a witness in behalf of himself and his co-defendant, and testified substantially:

1st. To the sale of the "Albert" Mining Claim to himself and Dickerson, Aug. 10th, 1872, for $12000, one-half of which was paid in cash and the balance by notes.

2d. That the note first set out in the complaint was then given to Jemison.

3d. That another note for a like amount, viz., $1750, was given to Nelson Allen as part of the purchase price of said claim.

4th. That subsequent to the delivery of the note for $1750 to said Allen, part payment of the same was made to said Allen, and the note secondly set out in the complaint was given for the balance.

5th. That at the time of said part payment, and the giving of said note for the balance, said defendants knew as much about the value of said mine as when suit was brought; and that he made said payment and gave said note for balance without making any objection on the ground of fraud in the sale.

6th. There was testimony given by defendants to the effect that said "Albert" Mine turned out not to be rich enough to pay for working, and that it was consequently valueless as a mine.

7th. The plaintiff, on the other hand, testified that he was one of the original locators; that before the sale there was every indication that there might be a mine; that there was "a good deal of rich "rock on the surface; that he got assays of $1000 "per ton of samples; that there had been eight "or ten days work done altogether; that a cut "had been run a few feet which showed mineral all "through; that they took out about half a ton of "good rock."

8th. George Treat was recalled and further testified in behalf of himself and his co-defendant: "When I purchased the Albert Mine, parties "themselves present, Jemison, Allen, McDermid "and De-Mill. I understood at time continuation "of Tehama, and understood Tehama was good. "*Don't recollect what was said at any time* before "sale as to *character of the mine.* * * * *Am* "*not positive plaintiff was present.* * * * *Found* "*a shelf of ore on top;* when got through that, "found it barren. Sunk twenty-seven feet and "found it barren; that with some seams in other

" parts was all. Found no *other* ore on it."

On cross-examination, this defendant said : * *
" Discovered it no value in October, (1872.) * *
" I paid my portion of the De-Mill note. Paid
" all McDermid's note. *Paid Allen about time new*
" *note bears date* (April 16th, 1873). *When I paid*
" *these notes, knew as much as I know now about the*
" *value of mine.*

" Had opportunity to examine mine, and take
" out ore if I desired. De-Mill told me rock go
" $15 to $160 a ton at mine or Shelburn. Mr.
" Jemison don't think present. I understood the
" rock would assay poor rock $15 and rich $150.
" *Did not tell me how much* of this rock there was.
" Did not say could get out one ton. Did not
" state what could get out. Had been a few
" days work done on mine; three or four feet
" blasted out. I went and looked at it. Took
" samples at dump and had them assayed. * * *
" Came to San Francisco and had them assayed.
" Went back and looked at mine *before I purchased.*
" Did not buy it on the simple assertion of De-
" Mill, that it would pay $15 to $150 per ton. I
" had bought Tehama before this. *Within a few*
" *months before this*, Dickerson told me it was for
" sale then. I went out and looked at it. Had been
" there two days before I purchased. Was there
" once before, and then three or four days. Re-
" turned to San Francisco, and absent, probably, a
" a month before I returned. Then went up and
" stayed a few days' second time. Cannot state
" the exact words of De-Mill. I thought favor-
" ably of De-Mill at the time, and all of them *saw*

"*ore when I went to* look at the mine. *After I* "*bought I blasted down through it.*"

In answer to Churchill's question whether he would buy a costly mine on the representations of parties whom he had known but a few days, *said*, "*He would not wholly.*"

(See testimony of Treat in Bill of Exceptions.)

The plaintiff (below) then introduced the deposition of Dickerson (one of plff's in error), and George Treat as a witness, and both of them testified that shortly after they purchased the Albert Mine in 1872, they sold the one-half of the same for fifteen thousand dollars; that, upon the purchase of said "Albert" Mine by Treat and Dickerson, they entered into the possession of it, and continued in possession thenceforth till it was conveyed by them to other parties to whom they sold it; that after the sale of one-half thereof by said defendants for $15,000, the whole of said mine was conveyed by said defendants to the "Albert Mining Co.," a corporation organized for that purpose, and that the stock of said corporation was issued to the said defendants and their vendees in proportion to their respective interest in said mine, and that said corporation thenceforth held said mine till and at the time of the commencement of this suit, so that it was not in the power of said defendants (plff's in error) to re-convey said mine to said plaintiff (deft. in error).

It also appeared from the testimony of plff. (deft. in error), there being no testimony to the contrary, that the defts. (plff's in error) never at any time offered to reconvey said mine to plff. and

his co-vendors, and they never at any time before the commencement of this suit, objected to the payment of said notes on the ground of fraud, or alleged fraud in the sale, but that they promised to pay them from time to time, and that at the time plaintiff (deft. in error) purchased the note from Allen he had no notice of any contemplated defense to a suit.

And the defendants' witness Ross testified, in answer to the following questions propounded by defendants' counsel, as to how the two mines were located with reference to each other: "The Albert is south of the Tehama, across a cañon on the next hill." In answer to the question, does the Albert adjoin the Tehama Mine? he said, "Well, I think they do, there "may be a little space between them. I think "they are located so they adjoin one another, "but I should judge the works to be between four "and five thousand feet apart."

Upon this and other evidence not set out in Bill of Exceptions, the case was submitted to the jury, who found a verdict for plaintiff.

III.

STATEMENT OF THE ALLEGED ERRORS.

The case is now brought here by the defendants below by writ of error; and the only questions presented to this Hon. Court are: *First*—Whether the Court below committed any error in its rulings upon the trial in admitting or excluding evidence?

Second.—If the Court did commit any error, whether the plff's in error have been injured thereby?

The first exception taken, as appears by the record, is this:

"The defendants offered to prove by said Treat "that, at the purchase of the *Tehama Mine*, the "vendors made representations as to the richness "of that mine, which turned out to be false; that "they had assays made which yielded from $15 "to $150 per ton, also to prove that the Tehama "Mine turned out not to be rich enough to pay "for working, and that after numerous tests made "the Tehama Mine was abandoned as worthless.

"The plaintiff objected, on the ground that the "testimony offered, is irrelevant and immaterial. "The Court being of opinion that the representa- "tions made on a former occasion concerning a "mining claim, situate with reference to the mine "in question, as this appeared to be, was imma- "terial, and also inadmissable under the pleadings, "there being no allegations in the answer of repre- "sentations made about the Tehama Mine, sus- "tained the objection, and defendant excepted."

(See Bill of Exceptions).

It seems to us only necessary to call the attention of this Honorable Court to the following facts, in order to show the total irrelevancy of all evidence offered by the defts. below concerning the sale and character of the "Tehama" Mine, viz.:

1st. The answer does not even mention the "Tehama" Mine.

2d. The sale of the "Albert" had no connection with the sale of the "Tehama" Mine (or mining claim).

3d. The sale of the "Tehama" claim took place some months prior to the sale of the "Albert" claim.

4th. That neither Treat nor Dickerson, according to their own testimony, relied upon any representation of any one in purchasing the "Albert" claim; but went and examined the property, saw ore, *exercised their own judgment as to its value*, and then purchased.

5th. If any fraud was committed against Treat and Dickerson in the sale of the "Tehama" claim to their injury, they had, *and have now*, their remedy by action therefor against the perpetrators of such fraud.

If the above evidence was admissable, it would be difficult to conceive anything which should not have been admitted if offered. The works in the two claims were 4000 or 5000 feet apart, and there was no evidence *nor offer to prove* that both claims were on one ledge; *nor that there was any ledge.* The condition of one would afford no evidence as to the condition of the other of those claims. Ore was seen by the purchasers in the "Albert" before the purchase. After the purchase that ore was *blasted* out, and it was ascertained that that body of ore did not continue except in seams.

The sale of the "Tehama" claim was not, nor were the representations concerning the said claim which it was proposed to prove co-temporaneous with the sale of the "Albert" claim. That sale

occurred several months before the sale of the "Albert," and had no relation to the Albert. During these months, after the sale of the "Tehama" and before the sale of the "Albert," Treat and Dickerson were in possession and had control of, and better opportunities for judging of the "Tehama" than did Jemison. The representations concerning the "Tehama," which defendants offered to prove, were made before and with a view to a sale of the "Tehama" only and not with reference to the "Albert," or the sale of the same.

Plaintiff did *not* concede (in the Court below) that either the "Tehama" or the "Albert" claims were worthless. On the contrary, as to the "Tehama," no question was presented concerning its value. But, as to the "Albert," evidence was introduced in his behalf, which was entirely uncontradicted, showing that considerable ore had been taken out of it, and that the prospect for a mine was good. And it was only sold as a *prospective claim*, not as a developed mine. If it had been a developed mine, yielding any considerable quantity of ore which would pay $160 per ton, it would have been worth millions instead of thousands.

The Bill of Exceptions does not contain all the evidence which was introduced before the jury. No motion was made for a new trial in the Court below, and this Court will not, we presume, review the finding of the jury in any case unless the record presents all the evidence which was introduced before the jury.

The second exception, as appears by the, record

follows immediately after, and is included in the first. It is as follows:

"And on similar grounds the Court ruled generally that it would not allow any testimony to be given by defendants, as to the character of the Tehama Mine, or the representations made in relation to its value by the plaintiff or his co-vendors *before the sale of the same* to the defendants, to which ruling the defendants duly excepted."

We refer to our comments on the first exception as applicable to this.

The third exception is this:

"The defendants offered to show, by the witness McDonald, that there had been a mill put up on the said "Tehama Mine" by the Tehama Mining Company, costing over eighty thousand dollars; that expenditures of money had been made in purchasing and prospecting said Tehama Mine, and it had all been abandoned because of its worthlessness, to which plaintiff objected as irrelevant and immaterial. The Court sustained the objection, to which ruling the defendants duly excepted."

This exception serves well to illustrate the frivolousness of the so-called defence sought to be interposed by the defendants below.

The fourth exception is:

"The plaintiffs' counsel offered to show, by the deposition of one of the defendants, and the testimony of the other in open court; that after the purchase of the said Albert Mine by the defendants, that the defendants sold and conveyed

"*one-half* of the same to other parties for a sum "greater than they (said defendants) paid the plain- "tiff and his co-vendors for the *whole of it*. To "this testimony the defendant's counsel objected, "because the same was irrelevant and incompetent.

"The Court overruled the objection, and did "decide that the same was relevant and competent, "to which said opinion and decision of the Court "counsel for defendants did then and there, on "behalf of said defendants, except. And the "plaintiff thereupon read from the deposition of "J. M. Dickerson, one of the defendants, who "deposed that George Treat, his co-defendant and "himself, shortly after they purchased the 'Al- "bert' Mine, sold *one-half* of said 'Albert' Mine "for the sum of *fifteen thousand* dollars, and that "he received the money for it on his share and "*never repaid any part of it*. The said George "Treat also testified, that he and his co-defendant "Dickerson sold one-half of the Albert Mine for "either twelve or fifteen thousand dollars—he was "not positive which sum."

This evidence was admissible, and material to the issues made by the answer for several reasons. The theory of the defense of Treat and Dickerson, as set up in their answer, was either:

1st. That they had the right to rescind the sale to them of the "Albert" claim, on the ground that they were induced to make the purchase by false suggestions of the vendors, which act of rescinding the sale would remove the consideration upon which the notes in suit were predicated; or,

2d. That they had sustained damages by reason

of the false suggestions, which damages they were entitled to recoup in this action.

If they adopted the first theory suggested (and we think this was the only one which they could have adopted under their answer), then in order to entitle them to rescind the contract of sale on the ground of fraud, the rule of law applicable to the case is elementary that they should have done so as soon as they discovered the fraud; and, if they went on and disposed of the property, or treated it as their own after they discovered the fraud, they thereby waived their right to rescind. And this evidence was admissible to prove one of a series of acts which would have waived their right to avail themselves of that defense, viz: that they had disposed of the property and put it beyond their power to reconvey it. If, on the other hand, they could, and did, adopt the second theory suggested, then this evidence was clearly admissible to prove that they had suffered no injury, and of course, could recoup no damages.

Again: Even if this evidence was immaterial, the defendants were not injured by it.

The fifth, and last exception, is this:

"The defendants then offered to prove by said "Treat, that the defendant Treat, after he and "Dickerson had sold the said one-half interest of "the Albert Mine for $15,000, *repurchased* a part "of the mine so sold, and in the repurchase he "was out five thousand dollars, to which the plain- "tiff objected as irrelevant and immaterial. The "Court sustained the objection, and defendants "duly excepted."

This evidence was clearly inadmissible for any purpose. It was not proposed to prove that the repurchase by Treat had any connection with the original purchase by him. He saw fit to speculate in the property, did so, and lost, without any fault of anyone except himself, so far as the offered evidence indicates.

IV.

CONCLUSION.

The whole of the evidence in the case, as well that of the defendants as that of the plaintiff—shows that in August, 1872, the plaintiff, and others, were the owners of an undeveloped mining claim situate in the State of Nevada, called the "Albert." Treat himself testified: "it was a min- "claim called the Albert." (See beginning of his testimony in record.) * * * * *

"Had opportunity to take out ore if I desired; " * * * * had been a few days work done "on mine—three or four feet blasted out. I went "and looked at it; took samples of dump and "had them assayed."

And after examining the claim, Dickerson and he bought it, August 10th, 1872, for $12,000, and gave notes in part payment for it. It was then conveyed to Treat and Dickerson; and they entered into possession of it and did some work on it. They blasted down through the shelf of ore which was in sight when they bought. Did not find any more ore except in seams. They discovered in October, 1872, as much as they now know about

the claim. No considerable amount of development was made or amount of work was done after the purchase. They "sank twenty-seven feet," says Mr. Treat, "and found it barren." No proposal was made to rescind the contract of sale to them; on the contrary, they remained in possession, and sold one-half of it to other persons for $15,000, which is $3,000 more than they had agreed to pay for the whole. When the notes matured they paid off the one given to McDermid; half of the one given to De-Mill; half of the one given to Allen, and gave Allen another note for the other half; this was in April, 1863, five or six months after they made all the discovery that they have ever made about the value of the "claim." They conveyed and delivered the possession of the whole claim to the "Albert" Mining Company, a corporation organized for that purpose, and that company issued its stock to the parties to whom they sold said one-half, and themselves pro rata; and said corporation entered into possession, and still holds the title and remains in possession of said claim.

From time to time Treat and Dickerson promised to pay the notes. These promises were made both before and after October, 1872; and they never intimated a desire to rescind until they did so in their answer in this case, which was filed September 15th, 1873 — almost a year after they say they made the discovery of the alleged fraud. In the evidence there is nothing tending to show that Jemison made any representation concerning the mine. The only evidence of any representation is,

that De-Mill, one of Jemison's co-vendors, said the ore would go from $15 to $150. The evidence shows that Jemison *was not present* when De-Mill made this statement; and that De-Mill did not say how much ore could be taken out; and that, in fact, an assay was made of ore taken from this claim showing the presence of $1000 per ton.

After Treat and Dickerson had paid the one-half of the Allen note, and given Allen a new note for the other half, Jemison bought this new note and paid nearly its full face in cash for it. Treat and Dickerson during all this time were promising to pay the notes. Subsequently, in August, 1873, Treat and Dickerson having failed to pay the notes, Jemison commenced this action against them to recover the moneys due on said notes. And thereafter, viz: September 15th, 1873, Treat and Dickerson filed their answer, wherein, for the first time, they alleged that they had been induced to purchase said claim by false suggestions, and offered to rescind the contract of sale to them. But upon the trial the evidence showed that they had disposed of one-half of this mining claim for more than they agreed to pay Jemison for it, and conveyed the whole of it away, and that they could not restore it to Jemison. They then sought to excuse themselves from reconveying it to Jemison, by endeavoring to show that it was worthless. Practically they say to us: "We took your 'claim,' it is true. "We sold half of it for more than we agreed to pay "you for the whole of it. But after we purchased, "we made further developments which prove that "the claim is worthless. Therefore, the consider-

" ation of our notes has failed, and we will not pay
" them. It is true we had the chance of developing
" a mine worth millions, which would have been all
" ours, for the $12,000 which we agreed to pay you;
" but now, after enjoying the chance—we do not
" find the mine as rich as we desired—and we will
" neither return it to you nor pay you for it."

We maintain:

1st. No fraud was practiced against Treat and Dickerson in the sale to them, and they never had the right to rescind the sale.

2d. If they ever had the right to rescind, they have waived such right.

3d. The writ of error was sued out for delay, and the allegations of error are frivolous.

We therefore respectfully ask that the judgment of the Circuit Court be affirmed, with damages.

Respectfully submitted,

W. W. FOOTE,

HOUGHTON & REYNOLDS,

Of Counsel for Defendant in Error.